(2)

Division Bench (Criminal)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR

CRIMINAL APPEAL NO 2603 /1997

17793
15/12/97
Arpan Pawar
Advocate
Mishra
Ld. A.R.

APPELLANT [IN JAIL] : Ku. Subhadrabai d/o Premlal Sharma, aged about 20 years, resident of Sarva, P.S.Kasdol, district Raipur.

v.

RESPONDENT : State of M.P.

APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE.

XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक Cri.A.No.2603/97 सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

D.B. : HON'BLE SHRI LAL CHAND BHADOO, J. AND HON'BLE SHRI VIJAY KUMAR SHRIVASTAVA, J.

8-12-2005

Mr. A.K.Prasad, Mr. Deepak Jain and Mr. Rajesh Tiwari, counsel for the accused/appellant.
Mr. U.N.S.Deo, Additional Public Prosecutor and Mr. Ravindra Agrawal, Panel Lawyer for the respondent/State.

Heard.

ORAL JUDGMENT

1. This appeal has been directed against the judgment of conviction and order of sentence dated 13-11-1997 passed by Additional Sessions Judge, Baloda Bazar in Sessions Trial No.164/1989, whereby the learned Additional Sessions Judge, after holding the accused/appellant Ku.Subhadrabai guilty for commission of the offences punishable under Sections 302 and 201 of the Indian Penal Code, sentenced her to undergo imprisonment for life and to pay a fine of Rs.5,000/-, in default of payment of fine to undergo further rigorous imprisonment for 1

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उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(44)

आदेश पत्रक

मामला क्रमांक —2— सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

year, and to undergo rigorous imprisonment for 3 years and to pay a fine of Rs.1,000/-, in default of payment of fine to undergo further rigorous imprisonment for 1 year respectively. The sentences awarded to the accused/appellant under Sections 302 and 201 of the Indian Penal Code have been directed to run concurrently.

2. The prosecution case, in brief, is that, P.W.-2, Munnalal, the Kotwar of the Village Sarwa, made a report i.e. merg intimation, Ex.P-1 to the Station House Officer, Police Station Kasdol on 7-2-1988 to the effect that the Pond of his village is dried up as there is no water in the same. A dead body of one newly born male child is lying in the said Pond. On receiving this report, Ex.P-1, the Station House Officer S.K. Yadav, P.W.-17 registered a Dehati Nalisi, Ex.P-12 and after giving notice to the Panchas under Ex.P-2, prepared a Panchnama of the dead body of the newly born male child under Ex.P-3 and he prepared the site-plan under Ex.P-13. On 13-2-1988, he gave a written requisition

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(45)

आदेश पत्रक

मामला क्रमांक —3— सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

under Ex.P-3A to Government Hospital, Baloda Bazar. P.W.-9, Dr. Smt. Jaishree Dave, who was posted in Government Hospital, Baloda Bazar, examined the accused/appellant Subhadrabai, and gave opinion that there are signs present in this case which indicate that Subhadrabai had delivered a fetus within 10 to 15 days before, and her report to that effect is Ex.P-3. On 17-2-1988, the accused/appellant Subhadrabai gave a memorandum, Ex.P-7, upon which the half piece of the handkerchief was taken into possessions from a Bush of Beshram under Ex.P-8 and the under-garment was taken into possession under Ex.P-9. The Station House Officer S.K.Yadav, P.W-17 requested to Government Hospital, Bilaigarh for examination of the dead body of the newly born child under Ex.P-17. P.W-12, Dr. Chandrashekhar Patel, who was posted at Government Hospital, Bilaigarh examined the dead body of the newly born male child and gave report Ex.P-6. After completion of the investigation, a charge-sheet was filed against the accused/appellant Subhadrabai along with Gangabai in the Court of Judicial Magistrate First Class, Baloda Bazar, who,

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर.

(46)

आदेश पत्रक

मामला क्रमांक ——— सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

in turn, committed the case to Sessions Judge, Raipur, wherefrom the Additional Sessions Judge received the case on transfer for trial. During the trial, the other accused Gangabai died, therefore, the trial proceeded against the present accused/appellant Subhadrabai.

3. The prosecution, in order to prove the offences against the accused/appellant, examined 18 witnesses. The statement of the accused/appellant was recorded under Section 313 of the Code of Criminal Procedure, in which she denied the prosecution evidence and further stated that she has been falsely implicated in the crime. She also produced one defence witness namely Jeevanlal, D.W.-1. The learned Additional Sessions Judge, after hearing the arguments of learned counsel for both the parties, convicted and sentenced the accused/appellant as mentioned in the earlier part of this judgment.

[पीछे देखिये

XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(47)

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -5-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

4. We have heard the learned counsel for both the parties.

5. Learned counsel for the accused/appellant argued that, in this case, there is no eye-witness to prove that the accused/appellant Subhadrabai delivered alive child and the evidence of P.W.-9, Dr. Smt. Jaishree Dave is not conclusive that the accused/appellant delivered alive child. Even the body of the child was not shown to Dr. Smt. Jaishree Dave, P.W.-9, therefore, the conviction of the accused/appellant under Sections 302 and 201 of the Indian Penal Code is bad.

6. On the other hand, learned Panel Lawyer, appearing for the respondent/State, argued that, in view of the evidence of P.W.-9, Dr. Smt. Jaishree Dave and P.W.-12, Dr. Chandrashekhar Patel, it is established that, the accused/appellant Subhadrabai delivered the alive child and thereafter the child was murdered and thrown in the Pond.

[पीछे देखिये

KI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक ..... सन् 200

..... विरुद्ध .....

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित -6-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

7. Having heard the learned counsel for the parties, we have perused the record. In this case, the prosecution has tried to prove the case by producing the witnesses that the accused/appellant Subhadrabai had physical relationship with Krishna Kumar, and on account of their cohabitation, she conceived. As Subhadrabai was unmarried, therefore, after delivery, the child was murdered and thrown, but P.W.-5, Chandramani, the brother of the accused/appellant has not supported the case and has stated that he never took his sister to the house of Gangabai for the purpose of delivery of child. P.W.-6, Rangela has stated that Subhadrabai was known to him, but he had no relation with her and he has no knowledge that Subhadrabai had any relation with anybody else and that she was pregnant. Krishna Kumar alias Munna has been examined as P.W.-11, who has also turned hostile and not supported the prosecution case and has stated that Subhadrabai was known to him, but he had no relation with her. He has also stated that, Dharamlal, Mehar and Rangela were known to him, but he had no

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

(49)

मामला क्रमांक —7— सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	knowledge that Subhadrabai had any relation with them or not. He had no knowledge that Subhadrabai was ever pregnant or not. P.W.-13, Hariram has also turned hostile and he has not supported the giving of the memorandum, Ex.P-7 and the recovery, Ex.P-8 and P-9. Therefore, in this case, there is no direct evidence establishing the fact that Subhadrabai was ever pregnant and she delivered the alive child. The whole case rests on the circumstantial evidence i.e. the evidence of P.W.-9, Dr. Smt. Jaishree Dave and P.W.-12, Dr. Chandrashekhar Patel and that one piece of handkerchief was recovered at the instance of the accused/appellant Subhadrabai from the Bush of Beshram. In order to prove the offence against the accused/appellant based on the circumstantial evidence, before the Court can base conviction on circumstantial evidence, the Court must satisfy itself that circumstances from which an inference of guilt could be drawn have been established by unimpeachable evidence led by the prosecution and that all the circumstances put together are not only of a conclusive nature but also complete the chain so fully as	

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

मामला क्रमांक —8— सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

to unerringly point only to the guilt of the accused and are not capable of any explanation which is not consistent with the hypothesis of the guilt of the accused, as has been held by Hon'ble the Apex Court in the case of **Nesar Ahmed and another vs. State of Bihar, reported in AIR 2001 SC 2416**. It is on the basis of these principles that, we shall proceed to scrutinise the evidence adduced by the prosecution.

8. P.W.-9, Dr. Smt. Jaishree Dave had examined the accused/appellant Subhadrabai in order to ascertain as to whether she had delivered any child. She has stated that, based on clinical examination of Subhadrabai, she reached to a conclusion that 10 to 15 days before, Subhadrabai had delivered fetus, and her report to that effect is Ex.P-3. In cross-examination, she has categorically stated that, she had not seen the fetus. The fetus may have been of 6 months, and based on the examination of the womb of Subhadrabai, it is not possible to give the age of the child. She was not in a position to state as to whether the child was fully developed or not. P.W.-12, Dr. Chandrashekhar Patel, in his

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

आदेश पत्रक

(51)

मामला क्रमांक —9— सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

evidence, has stated that, the child was born after a full period and he died on account of asphyxia by putting a cloth in his mouth. He examined the lungs, but hydrostatics test was not conducted by him. He has further stated that, even without this test, it can be ascertained as to whether the child breathed after taking birth or not. Therefore, on the basis of the evidence of P.W.-9, Dr. Smt. Jaishree Dave and P.W.-12, Dr. Chandrashekhar Patel, it is difficult to reach to a definite conclusion that the accused/appellant Subhadrabai gave birth to the same newly born baby, whose body was found in the Pond. Apart from that, in order to hold the accused/appellant guilty for commission of the offences punishable under Sections 302 and 201 of the Indian Penal Code, the prosecution was required to produce clinching circumstantial evidence that the accused/appellant Subhadrabai gave birth to alive baby. Dr. Chandrashekhar Patel, P.W.-12 has stated that, he had not conducted hydrostatics test, but without that test it can be ascertained as to whether the baby was born alive or not. To prove and substantiate the evidence, he has not

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(52)

आदेश पत्रक

मामला क्रमांक — 10 — सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

made clear in so many words that what was the basis for that. In absence of any reason, it is difficult to believe the evidence of this doctor. He has not stated that what type of test was conducted by him to ascertain whether the child was born alive or not. Even he has not conducted the hydrostatics test. In order to prove the fact that the child was born alive, the doctor ought to have explained in his evidence that the test conducted by him i.e. the examination of the lungs was cent per cent perfect. Therefore, in view of the insufficient evidence of P.W.-12, Dr. Chandrashekhar Patel and P.W.-9, Dr. Smt. Jaishree Dave, it is difficult to reach to the conclusion that, the accused/appellant Subhadrabai gave birth to the newly born baby, whose body was found in the Pond and that she gave birth to alive child. In order to ascertain that child was of Subhadrabai, Doctors could have conducted the D.N.A. (Deoxy Ribonucleic Acid) Test.

9. A piece of a handkerchief was recovered at the instance of the accused/appellant from a Bush of Beshram and

[पीछे देखिये

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(53)

आदेश पत्रक

मामला क्रमांक —II— सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

the part of the same handkerchief was found in the mouth of the newly born baby. In the first instance, there is no evidence to establish that, that handkerchief belonged to the accused/appellant. Apart from that, that piece of the handkerchief was recovered from an open place i.e. the bush which could have been seen by anybody as the body of the child was also found near the bush itself and before the accused/appellant Subhadrabai was taken to recover that piece of the handkerchief from the bush, number of persons saw the body of the newly born baby lying on the bush and on account of that the matter was reported by the Kotwar of the village to the Police Station. Therefore, no credence can be given to such recovery and accused can not be connected with the crime merely on the basis of such recovery.

10. In view of the foregoing reasons, we are of the considered opinion that, the prosecution has failed to prove the crime against the accused/appellant for commission of the offence under Section 302 of the Indian Penal Code i.e. giving birth to alive baby and thereafter to murder the baby. Consequently, the offence

[पीछे देखिये

XI-HC-22

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(52)

आदेश पत्रक

Cri. A. No. 2603/97

मामला क्रमांक —12— सन् 200

विरुद्ध

आदेश का दिनांक आदेश क्रमांक सहित	आदेश हस्ताक्षर सहित	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	under Section 201 of the Indian Penal Code automatically goes away as when the prosecution has not been able to prove the offence under Section 302 of the Indian Penal Code against the accused/appellant, therefore, there is no question of offence made out against the accused/appellant for commission of the offence punishable under Section 201 of the Indian Penal Code. 11. In the result, the appeal is allowed. The conviction and sentences passed against the accused/appellant Subhadrabai for commission of the offences punishable under Sections 302 and 201 of the Indian Penal Code are set aside. She be set at liberty forthwith, if not required in any other crime. **Sd/-** **L.C. Bhadoo** **Judge** **Sd/-** **V.K.Shrivastava** **Judge**	

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